

## Black Money Act - All you need to know - Part 3

Apr 30, 2021



**Ashish Mehta**

Partner, Khaitan & Co.

The first major lot of assessment orders have been passed under the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (**BMA**). Like timelines under various acts, the time limits for passing assessment orders under BMA were also extended on account of COVID 19 and the first major lot of assessment orders were passed on or around 31 March 2021. Taxpayers (in whose cases these orders have been passed) are in advanced stages of filing an appeal or would have recently filed appeals before the Commissioner (Appeals), which is the first appellate authority.

The author had co-authored an article on this topic last year. Published in two, part 1 released on 4 May 2020 ([Black Money Act - All You Need to Know - Part 1](#)) listed the basics of BMA and in Part 2 published on 8 May 2020 ([Black Money Act - All You Need to Know - Part 2](#)), the author had analysed some defenses available to the taxpayers. In this article (Part 3), the author has endeavored to cover aspects around appeals and related practical aspects of BMA.

### **Relevance of the date - 31 March 2021:**

BMA is effective from 1 July 2015. A limited period one-time disclosure window was introduced wherein one could file a disclosure (until 30 September 2015) and come clean by paying 30% tax and 30% penalty (effectively 60% of the value of undisclosed income and offshore assets). Immunities from action under five acts (Income Tax Act, 1961. Wealth Tax Act, 1957, Foreign Exchange Management Act, 1999, Companies Act, 2013 and Customs Act, 1962) were given to taxpayers who availed this opportunity.

Taxpayers who were not eligible for or did not opt to disclose and settle (by paying 60%) may later on discovery of such assets / incomes be required to pay 120% (being 30% tax and 90% penalty) and also be liable to prosecution under the provisions of BMA. A lot of notices were issued (under Section 10(1) of BM Act, the section under which assessment proceedings are initiated under BMA) in the year financial year 2017-18. Time limit prescribed to complete assessment is 2 years from the end of the financial year in which notice is issued, hence the time barring to complete these assessments was 31 March 2020. However, on account of COVID-19, this time limit was extended up to 31 March 2021. Thus, effectively the first lot of assessment orders under this Act were passed last month.

### **Received an assessment order under BMA, what next?**

Under Section 15 of BMA, any person can file an appeal before the Commissioner (Appeals)

within 30 days of the service of notice of demand relating to assessment or penalty under BMA. Delay of up to 1 year in appeal filing can be condoned by the Commissioner (Appeals) if he is satisfied that the appellant had sufficient cause for not filing the appeal in time.

Points on which an appeal can be preferred:

- 1) Where the person denies liability to be assessed under this Act, or
- 2) Where the person objects to the amount of tax on undisclosed foreign income and asset for which the assessing officer has passed an order, or
- 3) Where the person objects the levy of any penalty under BMA, etc.

There are various situations wherein the taxpayer may altogether deny liability to be assessed under the Act. This could be a situation where the taxpayer denies being treated as an 'assessee' to whom BMA applies or would have sufficiently explained the source of investment in such asset and hence is of the view that BMA does not apply at all. Or it could be a situation that the Tax Department would be aware of the existence of the offshore assets and incomes even prior to the BMA coming into effect and hence the taxpayer may claim that invocation of BMA in such a situation is untenable. In the alternative, the Taxpayer may contend that certain provisions of BMA are in contravention of the Constitution of India (see part 2 of this article for detailed arguments in this regard) and hence deny liability to be assessed under this Act altogether. Facts supporting, this argument needs to be taken as in such a case, the Commissioner (Appeals) will decide the issue regarding applicability of BMA initially and then take up the appeal on merits, if required.

If the facts support, taxpayers may also consider approaching the High Court with a writ petition seeking to quash the assessment order.

### **Who is the jurisdictional Commissioner (Appeals)?**

BMA proceedings have been kept outside the purview of faceless assessments and appeals and hence assessments and appeals are still being undertaken in the traditional manner. Until recently there was lack of clarity on where to file an appeal against an order passed under the BMA as there were no designated Commissioner (Appeals) under BMA and there was complete reorganization of Commissioner of Income Tax (Appeals) on account of introduction of faceless appeals. Taking note of this situation, the Central Board of Direct Taxes (**CBDT**) recently (on 23 March 2021) notified jurisdictional Commissioner (Appeals) for BMA. In the said notification 19 Commissioner of Income Tax (Appeals) under the Income Tax Act, were designated as Commissioner (Appeals) for the purpose of BMA. Jurisdictional Commissioner (Appeals) for major cities are listed in below table:

Sr No	Jurisdiction	Designated Commissioner to exercise jurisdiction for cases under BMA
1	Mumbai	Commissioner of Income Tax (Appeals) - 51, Mumbai.
2	Delhi	Commissioner of Income Tax (Appeals) - 31, Delhi.
3	Chennai (Tamil Nadu Puducherry)	Commissioner of Income Tax (Appeals) - 18, & Chennai.
4	Kolkata (West)	Commissioner of Income Tax (Appeals) - 20,

	Bengal & Sikkim)	Kolkata.
5	International Taxation	Commissioner of Income Tax (Appeals) -42, Delhi.

An appeal needs to be filed physically in Form 2 (along with applicable appeal filing fee) as prescribed under the requisite rules under BMA. The format of appeal under BMA also includes submission of statement of facts and grounds of appeal as is the case in appeals filed under Income Tax Act, 1961 (vide Form 35).

### **Appeal is filed, what next?**

Since proceedings under BMA have been kept outside the purview of faceless assessments and appeals, the appeals will be decided by the Commissioner (Appeals) in the traditional manner. Section 16(8) of BMA prescribes that the Commissioner (Appeals) shall endeavor to schedule hearings as expeditiously as possible and try and dispose the appeal within a period of one year from end of the financial year in which appeal is filed. The appeal process under BMA is quite similar to the normal appeal process under the provisions of IT Act and the Commissioner (Appeals) has been granted wide powers including enhancement related powers (after giving requisite opportunity to the taxpayers). The Commissioner (Appeals) has powers to consider and decide any matter which may not even have been considered by the Assessing Officer.

Once an appeal is filed with the Commissioner (Appeals), the taxpayers may also consider writing to the Assessing Officer to keep demand recovery as well as penalty proceedings in abeyance until the appeal is decided by the Commissioner (Appeals).

### **Higher appellate hierarchy**

An order passed by the Commissioner (Appeals) can be agitated before the Appellate Tribunal. An appeal will need to be filed with the Appellate Tribunal within 60 days from the date of receipt of order of Commissioner (Appeals).

An order of the Appellate Tribunal can be agitated before the High Court by filing an appeal within 120 days. The High Court will admit an appeal only if it is of the view that the matter involves a substantial question of law. An appeal will lie to the Supreme Court against an order of the High Court only in case the High Court certifies it as a fit case for appeal to the Supreme Court.

It may be noted here that Section 25 of BMA prescribes that taxes due in accordance with the assessment will need to be paid irrespective of the fact that the taxpayer is in appeal before the High Court or Supreme Court.

### **Practical suggestions for taxpayers**

All in all, robust documentation (especially explaining source of funds, wherever applicable), proper representation and filing responses / submissions coupled with accurate compliances will act as the best possible defence for the taxpayers against any regulatory action that may be initiated under BMA. It is also very important to note that ramifications of negative appellate orders are very high in case of BMA especially in view of the fact that the act prescribes for payment of taxes due irrespective of the fact that the taxpayer is in appeal before the High Court or Supreme Court. This provision makes the appellate proceedings before the Commissioner (Appeals) and Appellate Tribunal all the more

important as in case these orders are negative, there could be huge tax outflows on one hand and regulatory action like initiation of prosecution proceedings by the authorities on the other. One also needs to be mindful that only a question of law will be taken up by the High Court.

Thus, it becomes imperative to bring all requisite facts as well as arguments on record before the Commissioner (Appeals) as well as Appellate Tribunal and get adjudication on merits as Appellate Tribunal is the final fact-finding authority and the base for the case will be created by the orders passed by Commissioner (Appeals) as well as Appellate Tribunal.